

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

AAA MONROE ROCK CORP.,

Appellant,

v.

DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO 92-149

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

This matter came on for hearing before the Pollution Control Hearings Board on Thursday, May 27, 1993, in the Board's offices in Lacey, Washington. In attendance for the Board were Board Chairman Harold S. Zimmerman, Attorney member Robert Jensen, and member Richard Kelley with Administrative Appeals Judge John H. Buckwalter presiding. Proceedings were recorded by Louise M. Becker, Certified Shorthand Reporter, of Gene Barker & Associates of Olympia, Washington, and were also taped.

At issue was a \$7,000 civil penalty imposed by the Department of Ecology (DOE) on AAA Monroe Rock Corporation (AAA) for alleged violations of certain waste water discharge conditions of an NPDES Permit.

Appearances for the parties were:

Randy Florito, president of AAA, for Appellant.

Mark Jobson, Assistant Attorney General, for Respondent.

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(1)

1 Of the exhibits submitted by DOE, Nos. R-1 through R-7E were
2 admitted by stipulation of the parties; Nos. R-8,9,10 were admitted by
3 the Board after argument by the parties. AAA submitted no exhibits
4 and presented no witnesses.

5 Witnesses for DOE were sworn and testified, DOE exhibits were
6 examined and admitted, and arguments of the parties were heard. From
7 these, the Board makes these

8 FINDINGS OF FACT

9 I

10 AAA owns and operates a hard rock mine located on 166th Street,
11 Snohomish, Washington, which is subject to NPDES Permit No.
12 WA-003046-5(I) issued by DOE on June 26, 1987, expiration date June
13 30, 1992.

14 II

15 Gerald Shervey is, and was during the time of the events herein,
16 an employee of DOE responsible for participating in the issuance of
17 NPDES permits and for inspecting permitted facilities for adherence to
18 permit requirements.

19 III

20 On February 25, 1992, responding to a telephoned complaint that
21 oil was running down a road from AAA, Shervey investigated and found
22 no significant amount of oil but did notice what appeared to be an
23 excessive amount of turbidity at one point where waste water from AAA
24 was discharged from a pipe and at another where discharged water met a
25

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1 natural stream flow. The turbidity, which is an opaque, white water
2 condition and can be caused by the presence of excessive sediment in
3 water, indicated that the soluble content standards set by the NPDES
4 Permit were, perhaps, being exceeded.

5 IV

6 After taking photographs of the turbidity at the two locations,
7 Shervey went into the AAA area and, after speaking with and getting
8 permission from Mr. Fiorito, inspected the mining area, treatment
9 facilities, drainage ditches, and outfall pipe 001. (There is also
10 another outfall pipe designated as 002.) Following the inspection,
11 Shervey had a discussion with Fiorito in which he warned Fiorito of
12 the turbidity and of possible violations of permit limits.

13 V

14 Shervey subsequently, after reviewing DOE file copies of AAA's
15 sampling reports for the previous two months, returned to AAA on March
16 2, 1992. During this visit, Fiorito stated that each month he took
17 weekly samples, accumulated them in one bottle, and submitted the
18 bottle at the end of the month to a laboratory for analysis.

19 VI

20 On May 18, 1992, after Shervey reviewed the AAA monthly sampling
21 reports for November 1991 through March, 1992, DOE issued Notice of
22 Violation No. DE 92WQ-N201 and Notice of Penalty Incurred No. DE
23 92WQ-N202 to AAA. These documents alleged that AAA had violated
24
25

1 certain Special Conditions of the NPDES Permit (two violations of S1
2 and one violation of S2A) and assessed a civil penalty of \$8,750.

3 VII

4 On May 27, 1992, AAA filed an Application for Relief from Penalty
5 with DOE, and by Notice of Disposition dated July 6, 1992, DOE
6 restated the alleged violations but mitigated the penalty to \$7,000.
7 By filing with the Board on July 27, 1992, AAA submitted a timely
8 appeal of the \$7,000 penalty on the basis that it believed the penalty
9 to be excessive.

10 VIII

11 Any Conclusion of Law deemed to be a Finding of Fact is hereby
12 incorporated as such. From these Findings of Fact, the Board makes
13 these

14 CONCLUSIONS OF LAW

15 I

16 The Board has jurisdiction over the parties and the subject
17 matter of this action. RCW's 90.48.144, 43.21B.100.

18 II

19 The first alleged violation was:

20 *Special Condition S1 - Failure to comply with the sampling*
21 *requirements for Total Suspended Solids...*

22 The Permit requires that AAA submit two samples per week per
23 outfall to a laboratory for analysis. However, AAA put all its
24

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1 samples in a single container and submitted it a laboratory for one
2 test, thereby getting a composite report for all samples rather than
3 the individual reports required by the Permit.

4 The Board concludes that AAA did, in fact, violate S1 as alleged.

5 III

6 The second alleged violation was:

7 *Special Condition S1 - Failure to meet the effluent limitation*
8 *for Total Suspended Solids, a daily average of 25 mg/L and a*
9 *daily maximum of 45 mg/L.*

10 The data submitted by AAA showed a value of 920 mg/L for Total
11 Suspended Solids (TSS) for November, 1991; 130 mg/L for December,
12 1991; and 120 mg/L for March, 1992, all three values exceeding both
13 specified limitations of 25 mg/L (average) and 45 mg/L (maximum).

14 The Board concludes that AAA did, in fact, violate S1 as alleged.

15 IV

16 The third alleged violation was:

17 *Special Condition S2A - Failure to complete the discharge*
18 *monitoring reports correctly.*

19 The DMR (Discharge Monitoring Report) form requires that the
20 minimum, monthly average, and maximum TSS values be reported for each
21 outfall. No DMR form was submitted by AAA for month of November, 1991.
22 Data for outfall 001 and the average value for outfall 002 were not
23 reported in December, 1991, and January, 1992. The maximum TSS
24 values were not reported for outfall 001 in February, 1992, and March,
25 1992.

26 The Board concludes that AAA did, in fact, violate S2A as alleged.

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V

AAA argued (but presented no witnesses or exhibits) that the \$7,000 penalty, mitigated by DOE from \$8,750, is excessive because AAA, by its own statements, had properly sampled and reported sediment values many times in the past and because there was no proven harm to the environment. Even if AAA's argument had been supported by testimony, it would have been inconsistent with the following statutory provisions and the Board's own precedents in determining whether a penalty should be mitigated.

VI

Chapter 90.48 RCW, Water Rights - Environment, is a strict liability statute, and neither intent nor negligence is relevant. Further, neither is past alleged good conduct an excuse for present violations. Nor is it necessary that any actual harm to the environment be shown by the act committed. The purpose of the Act and associated rules, permits, forms, etc. is to prevent harm to the environment either from the present act or the potential harm from future acts performed in violation of stated requirements.

VII

RCW 90.48.144(3) provides that every violation "shall incur a penalty of up to ten thousand dollars a day for every such violation (and) every violation shall be a separate and distinct offense..."

If maximum penalties had been levied by DOE for each violation over the number of days in the five month period of time, the amount would have been astronomical. Instead, DOE assessed by the month rather than the day and arrived at an \$8,750 figure. After AAA's Application for Relief, this was then reduced by DOE to \$7,000 on the basis that the second and third violations were redundant.

VIII

RCW 90.48.144(3) also provides that "The penalty amount shall be set in consideration of the previous history of the violator and the severity of the violation's impact on public health and/or the environment in addition to other relevant factors".

DOE produced evidence that AAA had already been the subject of an enforcement action and penalty in 1991 for similar violations and that the present penalty was derived by using penalty criteria for "potential" damage to health or environment rather than "actual" damage.

IX

In consideration of the amount already mitigated by DOE, the prior action and penalty against AAA, the potential damage to the health/environment, and the lack of evidence of any meaningful corrective action by AAA to prevent a recurring problem which, in this case, extended over five months, the Board concludes that no further mitigation is warranted.

X

Any Finding of Fact which is deemed to be a Conclusion of Law is hereby incorporated herein. From these Conclusions of Law, the Board enters the following

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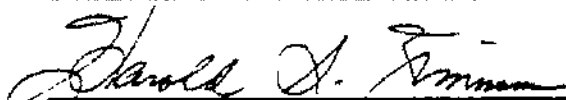
(8)

ORDER

THAT the \$7,000 penalty imposed by DOE on AAA in this matter is
AFFIRMED in full.

Done this 29th day of June, 1993

POLLUTION CONTROL HEARINGS BOARD




HAROLD S. ZIMMERMAN, Chairman



ROBERT V. JENSEN, Attorney Member



RICHARD C. KELLEY, Member


PRESIDING OFFICER:
JOHN H. BUCKWALTER
Administrative Appeals Judge

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